ANTI-TRUST LAWS APPLIED TO BANKING.

THE Act of Congress approved October 15, 1914, and generally referred to as the Clayton Anti-Trust Act, is entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes." The "anti-trust laws" supplemented by the Clayton Act include the Act of July 2, 1890, and the Act of August 27, 1890, as amended by the Act of February 12, 1913. In order to comprehend the purpose and intent of the Clayton Act it is accordingly necessary to review briefly the history of the legislation which it is intended to supplement. The Act of July 2, 1890, which may be treated as the original or fundamental anti-trust law adopted by Congress, provides in part that:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
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> "Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

In discussing the causes leading up to the passage of this Act, Chief Justice White, who delivered the opinion of the Court in the case of the Standard Oil Company *v.* United States,[1] said:

[1] 221 U. S. 1, 50.

"The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally. Although debates may not be used as a means for interpreting a statute (United States *v.* Trans-Missouri Freight Association, 166 U. S. 318, and cases cited) that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted.

"There can be no doubt that the sole subject with which the first section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the second section is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question."

It thus appears that the principles involved in the federal anti-trust laws were recognized under the common law, but Congress deemed it necessary to legislate on this subject in order to remove any doubt of their application to corporations engaged in interstate commerce and in order to provide a specific penalty enforceable by the government rather than to leave it to those injured by monopolies or contracts in restraint of trade to seek redress in the civil courts. Under the common law, contracts in unreasonable restraint of trade were held void as against public policy. The injury to the public necessarily resulted in such case from the elimination of competition, and as stated in the case of State *v.* Central Lumber Co.,[2] "monopoly

[2] 123 N. W. 504.

and competition being the exact opposites, anything tending to destroy competition tends toward monopoly."

It is, of course, obvious that these principles can be more easily applied to corporations engaged in trade or commerce than to corporations engaged in the business of banking. In the former case the effect on the public may be evidenced by an increase in the price of the commodity dealt in and may be directly traceable to a combination between corporations or individuals engaged in trade.

In applying the principles involved to the business of banking, however, it is more difficult to trace from effect to cause. A monopoly of credits in the hands of a few bankers and the common control of loanable funds and banking facilities may prove equally as injurious to the public as a monopoly or common control of a commodity traded in. There are many who contend that competition in offering banking facilities to the public is so great that a monopoly of credits or of such facilities is a practical impossibility, and that the so-called "Money Trust" existed only in imagination. Congress, however, after an exhaustive examination did not share this view, and the purpose of Section 8 of the Clayton Act which deals with the subject of banking was, as outlined by the Juduciary Committee in reporting the bill to the House:

> "To prevent as far as possible control of great aggregations of money and capital through the medium of common directors between banks and banking organizations, the object being to prevent the concentration of money or its distribution through a system of interlocking directorates."

The belief that the concentration of wealth in the hands of a few and the uncontrolled use of such wealth may prove injurious directly or indirectly to the public can hardly be said to be merely a development of modern corporate activities. It may be more accurately described as a revival of any inherent public prejudice against monopoly which may have been more or less dormant for some years in so far as it relates to the business of banking. It is probably true, however, that the fear on the part of the public of a monopoly of the banking business antedates in this country the fear of monopolies in trade and commerce.

The *History of Banking of All Nations*[3] by the late Professor Sumner of Yale contains many striking illustrations of the attitude of the public to banking during the early days of our republic. It is said that in 1803 two bank acts in Vermont were vetoed on the ground that, "Banks demoralize the people by gambling and concentrate the wealth in the hands of the few, and are useless to the many, since they give credit only to the rich." In speaking of the Bank of Alexandria, Virginia, Professor Sumner said that, "It required all the eloquence of Brandt of Virginia to persuade the legislature that the little Bank of Alexandria would not sweep away their liberties." And references was made to the fact that in Massachusetts, in 1799, "A law was passed making it unlawful to join any association to do banking of any kind unless authorized by law, the penalty being $1,000."

The opposition to the establishment of the First and Second Banks of the United States, according to historians, was based to a very large extent upon the fear on the part of the States that the creation of these banks would concentrate in the hands of the federal government a power so great as to become a menace to the States and their citizens. As stated by Mr. Justice White, in the opinion of the Standard Oil Company *v.* United States:[4]

> "The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country as a result of the structure of our Government, did not serve to assuage the fear as to the evil consequences which might arise from the act of individuals producing or tending to produce the consequences of monopoly."

It may reasonably be assumed, therefore, that in endeavoring to apply the principles of the anti-trust laws to the business of banking, Congress intended to preserve as far as possible legitimate competition, and thus to prevent the creation of a monopoly, either locally or otherwise, of credit and banking facilities; that in doing so it had in mind the prevention of injury to the

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[3] Published by Journal of Commerce and the Commercial Bulletin, 1896.

[4] *Supra.*

public as well as the protection of the individual bank. The method adopted differed from that prescribed in the original anti-trust law which prohibited the making of contracts or the entering into combination or conspiracies in restraint of trade, or commerce, and which prohibited any person from attempting to monopolize, or to combine, or conspire with any other person or persons to monoplize any part of the trade or commerce among the several States or with foreign nations.

The nature of the banking business is such that it would have been difficult to prevent by general language of this sort evils which may result to the public and to competitor banks from the concentration of the control of funds in the hands of one or more banking institutions. Accordingly, as the most direct method of accomplishing the purposes of the Act it was drawn so as to prevent the same person from exercising control over two or more banking associations by serving as an officer, director or employee of both associations, where the exercise of such control would have a tendency to destroy or restrain competition between such banks and thus to create a monopoly. Having constitutional authority to legislate on the subject of banks organized or operating under the laws of the United States, Congress undertook to accomplish this object by prescribing qualifications of officers, directors, or employees of such banks.

As originally drawn, Section 8 of the Clayton Act provided in substance that:

"(1) No banking association organized or operating under the laws of the United States and located in a city of more than 200,000 inhabitants shall have as an officer, director, or employee a private banker or an officer, director, or employee of another bank located in the same city.

"(2) The same person shall not be an officer, director, or employee of two banking associations organized or operated under the laws of the United States if either has deposits, capital, surplus, or undivided profits aggregating more than $5,000,000.

"(3) That no banking association organized and operating under the laws of the United States shall have as a director a private banker or a director of a State bank or trust company which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000."

The Act makes certain exceptions to these provisions:

"(a) They do not apply to mutual savings banks not having a capital stock represented by shares.

"(b) They do not in any way prohibit a person who is a class A director of a Federal reserve bank from being an officer or director or both an officer and director in one member bank.

"(c) They do not apply to banks or trust companies where the entire capital stock of one is owned by stockholders in the other."

While the purpose of the Act, as its title implies and the context shows, was to prevent unlawful restraint and monopolies, the language used in Section 8 construed literally would prevent the same person from being an officer, director, or employee of two different banks under certain circumstances, whether or not such banks were in competition, or whether or not common control of the two could result in restraining competition and thus create a monopoly.

On May 15, 1916, therefore, Congress passed what is popularly known as the Kern Amendment, the effect of which was to restore this element of competition as a factor in determining under what circumstances the same person may serve as an officer, director, or employee of two banking associations. To illustrate, under the Act as originally passed, the same person could not serve as a director of two national banks in the same city of 200,000 inhabitants, even though such banks were in no sense competitors. Under the Amendment of May 15, 1916, however, the Federal Reserve Board is vested with a discretion to determine whether such banks are in substantial competition, and, if not, to permit a person to serve as a director of both banks. This discretion is judicial rather than arbitrary. The language of the amendment is as follows: [5]

"That nothing in this Act shall prohibit any officer, director, or employee of any member bank or class A director of a Federal reserve bank, who shall first procure the consent of the Federal Reserve Board, which board is hereby authorized, at its discretion, to grant, withhold, or revoke such consent, from being an officer, director, or employee of not more than two other banks, banking associations, or trust companies, whether organized under the laws of the United

States or any State, if such other bank, banking association, or trust company is not in substantial competition with such member bank."

The Federal Reserve Board, under this amendment determines whether the two banks are in substantial competition, and grants or refuses its consent according to its decision on this question.

It will be observed that the Clayton Act applies specifically to the qualification of officers and directors of banks having resources aggregating more than five million dollars and of banks located in cities of more than two hundred thousand inhabitants. This is consistent with the purposes of the Act as outlined by the judiciary committee, in reporting the original bill to the House; since it is in the larger cities that concentration of banking funds and banking facilities is more likely to occur. Accordingly, banks located elsewhere are not specifically included in the prohibitory provisions of the Act until their resources aggregate more than five million dollars.

Some of the opponents of this legislation criticize it on the ground that it will prove ineffective; that the same interest may still control several different banking institutions through the medium of "dummy" directors, and that many banks have been required to dispense with the services of valuable members of their boards.

There are few statutes, however, which are not capable of evasion, and since the position of bank director is one of constantly increasing responsibility and importance it is not likely that the management of a bank's affairs will in many instances be entrusted to the "dummy" director. Other subterfuges may be resorted to; but in all probability this legislation will contribute materially to the preservation of the independence and integrity of the different banks, will promote legitimate competition and will render it increasingly difficult to create a monopoly of credits and banking facilities.

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[5] Act of May 15, 1916.